

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 15, 2007

STATE OF TENNESSEE v. FREDRICO L. HORTON

**Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-3051 Cheryl Blackburn, Judge**

No. M2006-01318-CCA-R3-CD - Filed July 5, 2007

A Davidson County jury convicted the Defendant, Fredrico L. Horton, of robbery. On appeal, the Defendant contends that: (1) the trial court erred when it refused to allow him to cross-examine a State witness about the witness's mental health; (2) the evidence is insufficient to support his conviction and the trial court should have granted his motion for judgement of acquittal; and (3) the trial court erred in its duty as a thirteenth juror. Concluding that no error exists, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Danny J. Baxter, Nashville, Tennessee, for the Appellant, Fredrico L. Horton.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Brett Gunn and Ben Winters, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the robbery of David Lewis Stephens. At the Defendant's trial on this charge, David Lewis Stephens testified that he had known a woman named Star Reedy, a co-defendant, for ten or eleven years, and he had dated her several years before this incident occurred. Stephens described the events that occurred a few days before the robbery, stating that Reedy sold him her maroon Monte Carlo that was in a towing lot because it had been involved in a car accident. Stephens paid her \$400 for the car, which they agreed was worth \$800, and he agreed to pay her more after he ascertained how much it was going to cost to fix the damage to the car. As part of this transaction, Reedy gave Stephens title to the car, but Stephens had not transferred the title to his

name a week after the transaction, when the robbery occurred. During the week that Stephens owned the car, he performed some body work on it while it was located in his mother's yard. He then took it to a body shop to be painted.

Stephens testified that a few days after he purchased the car, Reedy called and said she wanted the car back. He agreed to sell it back to her for \$800, and he went to her house with his girlfriend of six years, Gladys Majors, to get the money. Stephens went inside the house while Majors remained in the car. When he went inside, both Reedy and the Defendant were there, and the Defendant and Stephens went to Reedy's bedroom to get the money while Reedy remained in the kitchen. Stephens got some of the money, and then went to the kitchen to get the rest of the money from Reedy. As he entered the hallway, the Defendant pointed a gun at him and said, "I can't give you the money like that." The Defendant asked Stephens for the car keys and the car title. Stephens gave the Defendant back the money that he had just received, and, although the keys were in his pocket, he told Reedy that the keys and title were inside the car. Reedy left and went to look in the car. When she returned, Stephens handed the Defendant the car keys and title. Reedy then stuck her hand inside Stephens's pocket and retrieved \$1100 in cash that he had there from proceeds that Majors had obtained from an insurance check.

Stephens testified that he returned to his vehicle, told Majors what occurred, and called the police as he drove toward the body shop where the Monte Carlo was located. He attempted to describe this incident to police as he drove toward the body shop to prevent Reedy and the Defendant from obtaining the car. Stephens and Majors arrived at the body shop before Reedy and the Defendant, and Stephens was speaking with the police when they arrived. Stephens remained on the phone with the police and described what was happening, including that the Defendant and Reedy got into the Monte Carlo and drove away. The 9-1-1 operator told Stephens to remain at the body shop and wait for the police, but Stephens followed the Monte Carlo to see in what direction the Defendant drove. When Stephens returned to the body shop, he saw the police, and he told Detective Chad Gish about the car accident that Reedy had been involved in before she sold him the car. He later identified Reedy and the Defendant in a photographic line up as the individuals involved in this incident. A tape of Stephens 9-1-1 call was played for the jury.

On cross-examination, Stephens testified that he knew that the Defendant and Reedy were dating each other when he decided to purchase Reedy's car. Stephens agreed that he did not put the car title in his name and had no documentation to prove that Reedy had sold him her car. He acknowledged that Reedy drove the car for two days after he repaired the car. He denied calling Reedy and telling her that he had seen the Defendant in the car. Stephens conceded that, on the day of this incident, he went to the body shop with Majors and met the Defendant. Stephens agreed that he told the 9-1-1 operator that he was driving to Reedy's house to give her the rest of her money. He explained that he had just been robbed, he was frantic, and he got his words mixed up. When asked why Stephens did not sign an arrest affidavit until three weeks after the alleged robbery had occurred, Stephens testified that the situation had stunned him, and he hesitated to take a warrant out on Reedy.

Gladys Majors testified that she was dating Stephens at the time of this incident. She was present when Reedy agreed to sell Stephens the Monte Carlo and when Stephens exchanged money with Reedy for the car and the title. Majors accompanied Stephens to Reedy's house and, while Majors sat in the car, Reedy came outside and demanded the keys and said, "Hand me the keys, B***ch, or your boyfriend is dead." Majors told Reedy that she did not have the keys, and Reedy went back inside. Stephens came out to the car and told Majors that he had just been robbed. Majors and Stephens drove to the body shop, and Stephens called 9-1-1. After Majors and Stephens arrived at the body shop, the Defendant and Reedy arrived, and the Defendant had a gun. The Defendant and Reedy got into the Monte Carlo and drove away. Stephens followed them and then returned to the body shop. Majors confirmed that the \$1100 in cash that the Defendant took from Stephens' pocket consisted of proceeds from an insurance check. Majors met with Detective Gish and identified the Defendant and Reedy as the perpetrators of the crime.

Robin Stephens, the victim's mother, testified that her son had parked a Monte Carlo in her yard and performed various types of body work on the car. He said that he purchased this car from a "girl named Star," and he showed her the title to the car, which she did not look at closely. On cross-examination, Robin Stephens testified that she told her son that he needed to get the title signed off on the back and put the title in his name.

Randy Tillman, Stephens' nephew, testified that he helped Stephens work on the Monte Carlo. Stephens referred to the car that they worked on as his own.

Detective Chad Gish testified that, as part of his investigation of this incident, he interviewed Stephens and Majors. The detective described how the Defendant and Reedy became suspects in this case and how he conducted a photographic lineup with the victims of the crime. Both Stephens and Majors identified the Defendant and Reedy in the lineup.

Star Reedy testified that she was romantically involved with Stephens at the time of this incident. She said that Stephens offered to fix her Monte Carlo, which was titled to Brandy Rogers. Reedy gave Stephens the title to her car so that he could get her car out of a towing lot, and he returned the title to her two days later. She denied offering to sell Stephens the Monte Carlo and asserted that she could not have sold him the car because the car belonged to Brandy Rogers. Reedy testified that she got the car back after it was repaired by Stephens. The Defendant picked the car up from a body shop and returned it to Reedy. The Defendant told Reedy that Stephens had seen him driving the Monte Carlo. Reedy received a phone call from Stephens, and she could tell that he was upset. Stephens told her that he wanted her to pay him the money he had used to fix her car, and she told him that she did not have any money. Reedy denied ever being at her house with Stephens and the Defendant, and she denied ever threatening Majors or robbing Stephens.

On cross-examination, Reedy testified that Stephens decided to spend his time and money fixing her car because they had a sexual relationship. She did not tell anyone about her relationship with Stephens, and Stephens knew about her relationship with the Defendant. Reedy acknowledged that she was the owner of the car even though the car was not titled in her name.

Based upon this evidence a Davidson County jury convicted the Defendant of robbery.

II. Analysis

On appeal, the Defendant contends that: (1) the trial court erred when it refused to allow the Defendant to cross-examine the alleged victim about his mental health condition; (2) the evidence is insufficient to support his conviction and the trial court should have granted his motion for judgement of acquittal; and (3) the trial court erred in its duty as a thirteenth juror.

A. Cross-Examination Regarding Victim's Mental Health

The Defendant contends that the trial court erred when it refused to allow him to cross-examine Stephens about his mental health. At trial, Stephens acknowledged that he had mental health issues, and a hearing was held outside the presence of the jury. Stephens testified that, after this incident, he tried to kill himself and was charged with possession of a weapon. While in custody, he received a diagnosis for bipolar disorder. Stephens took Lithium and Wellbutrin to treat his disorder, and then a psychiatrist “weaned him” off of the Lithium and Wellbutrin. Stephens went to counseling classes, and he no longer exhibited any symptoms of mental illness. Consequently, Stephens and a psychiatrist decided to see how he reacted without any medication. Stephens’ doctor stopped prescribing him medication, and he had not taken any medications for the past six months. Stephens acknowledged that he goes for two to three days without sleep but denied that this lack of sleep affected his memory. He contended that his memory was sufficient to testify at trial. He testified that he was not taking any medication when the robbery occurred.

After hearing the arguments of the parties, the trial court concluded that this evidence was not relevant because there was not an assertion that Stephens’s memory was affected by this diagnosis, the Defendant seemed to be “playing to a stereotype,” and this diagnosis and his medications were totally unrelated to the robbery.

A defendant’s constitutional right to confront the witnesses against him includes the right to conduct meaningful cross-examination. *State v. Wyrick*, 62 S.W.3d 751, 770 (Tenn. Crim. App. 2001). Denial of the defendant’s right to effective cross-examination is “constitutional error of the first magnitude” and may violate the defendant’s right to a fair trial. *State v. Hill*, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting *Davis v. Alaska*, 415 U.S. 308, 318, (1974)). “The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the sound discretion of the trial court.” *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); *Coffee v. State*, 216 S.W.2d 702, 703 (1948). Furthermore, “a defendant’s right to confrontation does not preclude a trial court from imposing limits upon cross-examination which take into account such factors as harassment, prejudice, issue confrontation, witness safety, or merely repetitive or marginally relevant interrogation.” *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994).

The defendant’s right to cross-examine a witness is also limited to questions that are designed to elicit relevant evidence. Tenn. R. Evid. 401, 402 (providing that “evidence which is not relevant

is not admissible”); see *Monts v. State*, 379 S.W.2d 34, 40 (Tenn. 1964); *State v. Adkisson*, 899 S.W.2d 626, 645 (Tenn. Crim. App. 1994); *State v. Rhoden*, 739 S.W.2d 6, 11 (Tenn. Crim. App. 1987); *State v. Braggs*, 604 S.W.2d 883, 886 (Tenn. Crim. App. 1980); *Taylor v. State*, 551 S.W.2d 331, 335 (Tenn. Crim. App. 1976); Neil P. Cohen, et al., *Tennessee Law of Evidence* § 611.4 (2d ed. 1990). *Tennessee Law of Evidence* section 611.4 states:

Although Rule 611(b) follows the traditional wide-open approach to the scope of cross-examination, there are still many limits on the subjects that can be raised during cross-examination. One example is the concept of relevance: cross examination cannot delve into irrelevant matters.

The term “relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. In short, evidence is relevant if it tends to prove a material issue. Tenn. R. Evid. 401, Advisory Comm’n Cmts. There are further limitations on the relevant evidence that the Defendant may elicit during cross-examination of a witness. Tennessee Rule of Evidence 403 states, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” This Court will not disturb the limits that a trial court has placed upon cross-examination unless the court has unreasonably restricted the right. *Wyrick*, 62 S.W.3d at 770.

The Defendant in the case under submission points to *State v. Barnes*, 703 S.W.2d 611 (Tenn. 1986), to support his contention. In that case, the defendant sought to cross-examine a State witness who had extensive hospitalizations for mental illnesses, which included auditory and visual hallucinations, over a period of several years. *Id.* at 615-17. The witness had been released from a mental health institution approximately three months before the crime at issue in the case occurred. *Id.* The witness was again hospitalized after the crime, and he was released shortly before the trial. *Id.* The Tennessee Supreme Court held that a particularly wide scope of cross-examination must be allowed in criminal cases when the witness is crucial to the prosecution. *Id.* at 617-18. The Court concluded that the trial court erred when it did not allow the use of hospital records in the cross-examination of a key State witness’s mental instability. *Id.* at 618. The Court explained that the hospital records at issue “were relevant because facially they indicated mental instability that might reasonably be expected to affect the witness’s contact with reality and his ability to recall events accurately within a time frame relevant to the crime and to his trial testimony.” *Id.* The Court further noted that the evidence of mental instability must be shown to have existed within a reasonable time of the events about which the witness testifies or within a reasonable time before the testimony is given. *Id.*

After reviewing *Barnes*, we conclude that it is distinguishable from the case at hand. In this case, the Defendant did not obtain or seek to admit into evidence Stephens’s mental health records. Further, he offered no expert who would testify how bipolar disorder may affect one’s ability to recall

events or to tell the truth. Finally, Stephens' bipolar diagnosis and the medications that he took as a result thereof occurred after this crime occurred. Stephens had recovered and had not been medicated for six months prior to the trial. Accordingly, we conclude that the trial court did not abuse its discretion when it determined that this line of questioning was not relevant.

B. Sufficiency of the Evidence

The Defendant challenges both the sufficiency of the evidence to support his conviction and the trial court's denial of his judgment of acquittal. Specifically, the Defendant contends that the evidence clearly indicates that no one ever recovered a handgun from the Defendant and that, because the jury discredited Stephens' testimony that the Defendant had a gun, the State had failed to prove that the Defendant committed a robbery beyond a reasonable doubt. The State contends that the evidence is sufficient to sustain the conviction and that the trial court correctly denied the Defendant's motion for a judgment of acquittal. The record reflects that the trial court made the following determinations when denying the Defendant's motion for a judgment of acquittal:

With regard to [the Defendant], the testimony was clear he had a gun, demanded personal property, placed [Stephens] in fear and then went and took the car, all of which is the essential elements. It's not my job at this point to look at credibility. That's the jury's job. So motion is overruled and denied.

We apply the same standard when reviewing whether a trial court erred in denying a motion for judgment of acquittal as when reviewing whether the evidence was sufficient to sustain a conviction. *See State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). Accordingly, in the case under submission, we will address these issues together.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the

trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000). Importantly, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. *Bland*, 958 S.W.2d 651 at 659.

Robbery is “the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” T.C.A. § 39-13-401(a) (2003). “A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” T.C.A. § 39-14-103 (2003). A robbery becomes aggravated when the defendant “display[s] . . . any article used . . . to lead the victim to reasonably believe it to be a deadly weapon.” T.C.A. § 39-13-402(a) (2003).

The Defendant correctly notes that the jury rejected Stephens’ contention that this robbery was committed with a weapon, thereby making it aggravated robbery. The jury, however, credited Stephens’s contention that the Defendant forcibly denied him of his property by violence or putting him in fear. The evidence proved that Stephens purchased a car from Reedy, and she wanted to buy it back from him. He went to her house to get the money, and he was, at the time, in possession of \$1,100 in cash from the proceeds of an insurance check. The Defendant demanded Stephens’ car keys and title by placing him in fear. The Defendant then went to the body shop where the car was located and took the car. This evidence is sufficient to support the Defendant’s robbery conviction. Therefore, the Defendant is not entitled to relief on this issue.

C. Thirteenth Juror

The Defendant contends that the trial court erred in its duty as a thirteenth juror. The Tennessee Rule of Criminal Procedure 33(f) imposes a mandatory duty on the trial judge to serve

as the thirteenth juror in every criminal case. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). Rule 33(f) does not require the trial judge to make an explicit statement on the record. Instead, when the trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict. *Id.* Only if the record contains statements by the trial judge indicating disagreement with the jury's verdict or evidencing the trial judge's refusal to act as the thirteenth juror, may an appellate court reverse the trial court's judgment. *Id.* Otherwise, appellate review is limited to sufficiency of the evidence pursuant to Rule 13(e) of the Rules of Appellate Procedure. *State v. Burlison*, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). If the reviewing court finds that the trial judge has failed to fulfill his or her role as thirteenth juror, the reviewing court must grant a new trial. *State v. Moats*, 906 S.W.2d 431, 435 (Tenn. 1995).

At the conclusion of the hearing on the motion for new trial, the trial judge stated her findings on this issue as follows: "Thereupon, this cause came to be heard by the Court upon a Motion for New Trial; after due consideration and all the evidence introduced, said motion is denied with an order to be entered." Thus, the judge indicated her approval of the verdict and her willingness to fulfill her role as thirteenth juror. Based on the trial judge's actions, we must presume that the trial judge independently evaluated the physical evidence and the testimony of the witnesses at trial, weighed the credibility of that evidence as provided by Rule 33(f), and found no reason to overturn the jury's verdict. *Carter*, 896 S.W.2d at 122. Accordingly, the Defendant is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authority, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE